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No. 218.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error.

v.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JAMES DONOVAN,
Attorney General of the State of Montana,
and Attorney for Defendant in Error.

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v.

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BRIEF FOR DEFENDANT IN ERROR.

There is but one question involved in this case, although it may be treated as having three phases:

1. Does Section 7 of Chapter III of the Bankruptcy Act grant an immunity from prosecution for the offense to which the testimony which may be given by the bankrupt relates, which is as broad as the constitutional immunity

that "no person shall be compelled in a criminal case to be a witness against himself?"

2. If so, is said section applicable to prosecutions and proceedings in the Courts of the State of Montana?

3. And if so, was the privilege and immunity waived by the plaintiff in error when, as defendant in the State Court, he failed to object to the cross examination and to refuse to answer the questions?

I.

Section 7 of the Bankruptcy Act provides as follows:

"The Bankrupt shall when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

Section 860 of the U. S. Revised Statutes, provides:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceedings in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for

perjury committed in discovering or testifying as aforesaid."

The Federal Court of the Ninth Circuit in the case of Mackel v. Rochester, 102 Fed. 315, construing the two provisions of the laws of Congress together, decided that the two provisions furnished absolute immunity from punishment to a bankrupt for any offense concerning which he may testify at his examination in bankruptcy. And it is upon this case that the attorneys for plaintiff in error rely.

We submit that the learned Federal Court did not find any justification for the decision in the language of the Bankrupt Act, but that it must have based its decision wholly upon the provisions of Section 860, and we admit that this decision would be high authority if it were not that this same Section 860 has been construed by the Supreme Court of the United States in the case of Counselman v. Hitchcock. In this case the Supreme Court held that as this provision would not prevent the use of the testimony so obtained to search out other testimony to be used against the witness, the protection afforded is not co-extensive with that of the Fifth Amendment and hence a witness in any criminal investigation in the federal courts may still refuse to answer on the ground that his testimony will tend to criminate him; that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege afforded by the constitution," (Art. V. Am.) and that the immunity from prosecution must be absolute.

Counselman v. Hitchcock, 142 U. S. 547.

The language of the proviso in question is as follows: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." It needs no argument to show that this proviso is entirely too narrow and restricted in its application to future criminal prosecutions to make it available to the bankrupt as a bar to a prosecution for any offense which his testimony might disclose. The only immunity granted is that of his *own* testimony shall not be used against him in any criminal proceeding. To this extent it is neither a greater or a less immunity than that granted by Section V of the Amendments *supra*. But is is not provided that there shall be no prosecution for such offense, and it would quite possible that a conviction could be secured without using his own testimony against him; while at the same time, it might have been impossible for the conviction to have been obtained, or the prosecution instituted in the first instance, but for the information furnished by the very testimony which he has been compelled to give.

In the case last above cited the Court had under consideration a statute which provided that the testimony of the witness should not be given in evidence against him in any criminal proceeding, *"or in any manner used against him, or his property or estate."*

In commenting upon the statute above referred to, this Court said: "It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evi-

dence or used against him or his property in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This of course protected him against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding before such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Counselman v. Hitchcock, 142 U. S. 564.

Continuing the Court says: "It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

Ibid. p. 565.

As above stated, the language of the Bankruptcy Act is not broad enough to exempt the bankrupt from prosecution for offenses about which he may testify; it does not provide that the *facts* about which he may testify shall

never be made the basis of any criminal prosecution. These facts may be proved by other witnesses whose existence would be disclosed by the bankrupt's testimony, in which case the bankrupt's so-called immunity from prosecution under the Bankrupt law would be but a sorry substitute for the absolute immunity granted him by the Constitution from being compelled to be a witness against himself.

On the other hand, to attempt to give the proviso the effect of absolutely barring future prosecution for the offense to which the bankrupt's testimony relates, would not only do violence to the English language as employed in the Section under consideration, but would lead to most confusing complications. Indeed, it is conceivable that the Bankruptcy Law under such a construction could be made the means of criminals securing immunity from prosecution for past offenses by testifying regarding such offenses in bankruptcy proceedings.

The case of Counselman v. Hitchcock is a leading case upon this subject, and is decisive. It is quoted with approval in the case of Brown v. Walker, 161 U. S. 591, cited by plaintiff in error, and in numerous Federal decisions quoted below.

The case of Brown v. Walker construed a statute much broader than either the provision of the Bankruptcy Act, or that of Sec. 860, and this statute was only sustained by an almost equally divided court, four of the most distinguished members of the court entering an emphatic dissent from the majority decision.

Counsel for the State concede that the case of Mackel

v. Rochester *supra* tends to sustain the position of the attorneys for plaintiff in error. But we also contend that the language upon which reliance is placed is a mere dictum of the court; that it is clearly against the well considered decision of the Supreme Court in the case of Counselman v. Hitchcock, and against the great weight of Federal authority.

See Editorial note to Mackel v. Rochester, 4 Am. Bank. Rep. page 1, and cases therein cited.

In re Scott, 1 Am. Bank. Rep. 49.

In re Hathorn, 2 Ibid. 298.

In re Rosser, 2 Ibid. 755.

In re Feldstein, 4 Ibid. 321.

In re Walsh, 4 Ibid. 693.

"It has been urged that the clause that the evidence given shall not be used in a crimnial proceeding protects the bankrupt. I am of the opinion that this clause is not sufficient. It is not as strong a protection as the clause considered by the Supreme Court in Counselman v. Hitchcock, 142 U. S. 547, which was held sufficient. My appreciation of that decision and of Brown v. Walker, 161 U. S. 591, is that a clause of that character, to be constitutional, must operate as a complete pardon for the offense. It must be a statute absolutely securing immunity from prosecution. The clause of Sec. 7 provides that the testimony shall not be used in evidence. This is insufficient to operate as a pardon for the offense, and hence cannot be considered sufficient to overcome the constitutional provision."

In re Hathorn, 2 Am. Bank. Rep. 298.

II.

As to whether or not the provision of the Bankruptcy Act referred to above can have effect upon the courts of the State of Montana, or be applicable thereto, or whether or not Congress has any power to say what shall be or what shall not be evidence in a State Court, we submit that the great weight of authority is to the effect that Congress has no such power.

The only case we find sustaining such power in Congress at all is the case of Brown v. Walker *supra*. But when this case is closely read we find that the court is somewhat in doubt upon this point, and really decides the question upon another ground, to-wit, that the liability of prosecution in a State court for an offense testified about in a Federal examination is too remote a proposition to be considered.

But we respectfully call the attention of the Court to the dissenting opinion in the case of Brown v. Walker, as follows:

"It is beyond the power of Congress to give any person immunity from prosecution in the Courts of a State for an offense against the State, though that offense be disclosed by self incriminating testimony, which such person has been required under an act of Congress, to give in a tribunal of the United States."

Also:

"As the provision of the Constitution of the United States which protects witnesses from self incrimniation can not be invoked in a State court, so neither can the Congres-

sional substitute therefor."

The Court's attention is also directed to the language of Chief Justice Marshall in Barron v. Mayor, 7 Pet. 247, also cited at length in the dissenting opinion in Brown v. Walker.

But whatever the decisions of the Federal courts may be upon this point, the State courts have uniformly held against the power of Congres to pass any such a law and to make it binding upon the State Courts.

In the case of Bowlin v. Comonwealth, 92 Am. Dec. 468, the Supreme Court of Kentucky have held as follows:

"A state may regulate her domestic concerns and prescribe remedies including rules of evidence in her courts, except when prohibited by her own constitution or that of the United States."

Also:

"That Congress has no power to repeal or modify the law of the State of Kentucky on the subject of Negro testimony."

In Knox v. Rossi, 48 L. R. A. 305, it is decided that Congress has no power to declare that a written instrument, unless stamped, shall not be received in evidence in a State Court.

See also:

Notes to above case.

Thomas v. State, 46 L. R. A. 481 and notes.

Small v. Slocum, 37 S. E. and numerous cases cited therein.

Clemens v. Conrad, 19 Mich. 170.

Sammons v. Halloway, 21 Mich. 162.

People v. Gates, 43 N. Y. 40.

Moore v. Moore, 47 N. Y. 467.

Moore v. Quirk, 105 Mass. 49.

III.

It is true that it appears from the transcript (p. 27) that the defendant was examined by the Referee in Bankruptcy, and that the testimony taken before said Referee was used by "counsel for the State reading from the testimony produced and left with him by the Referee in Bankruptcy," and interrogating the witness with the aid of such testimony. Nowhere does there appear any objection interposed by counsel for the defendant to the questions asked by the county attorney or to the use of such testimony. The defendant must, therefore be deemed to have waived all such objections by failing to make them at the proper time, and the State Supreme Court so held.

State v. Burrel, 27 Mont. 282.

"If he had any privilege when upon the stand in his own behalf in the criminal case, he waived it by not refusing to answer." (Tr. p. 49.)

An objection to the reception of evidence cannot be raised for the first time on appeal.

Griswold v. Boley, 1 Mont. 553.

Stafford v. Hornbuckle, 3 Mont. 488.

Rutherford v. Talent, 6 Mont. 134.

Bass v. Buker, 6 Mont. 447.

Brand v. Servoss, 11 Mont. 87.

Merchants' Nat. Bank v. Greenhood, 16 Mont. 458.

It is respectfully submitted that the record herein discloses no error on the part of the Supreme Court of the State of Montana in affirming the judgment of the District Court, and that the judgment of said Supreme Court and of said District Court should be affirmed.

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and Attorney for Defendant in Error.